

June 21, 1990

Mr. Dennis Shields
P. O. Box 828
Captain Cook, Hawaii 96704

Dear Mr. Shields:

Re:Public Access to Computer Tapes Containing Data
Furnished in Voter Registration Affidavits

This is in reply to your facsimile letter dated December 6, 1989, requesting an advisory opinion concerning public access to computer tapes maintained by the Hawaii County Clerk which contain data compiled from voter registration affidavits.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the public has the right to inspect and copy computer tapes containing data furnished in voter registration affidavits.

BRIEF ANSWER

Under the UIPA, each agency "shall disclose . . . [g]overnment records which pursuant to . . . a statute of this State, are expressly authorized to be disclosed." Haw. Rev. Stat. . 92F-12(b)(2) (Supp. 1989). Chapter 11, Hawaii Revised Statutes, expressly provides that voter registration affidavits, and records "appertaining to" the registry of voters or to elections, be available for public inspection and copying. Insofar as sections 11-15(d) and 11-14(b), Hawaii Revised Statutes, permit the inspection and duplication of voter registration affidavits, we do not believe that the Legislature intended section 11-14(b), Hawaii Revised Statutes, be applied

to restrict access to computer tapes containing similar data. Since the authority to render legal advice regarding whether a municipal ordinance conflicts with its enabling state statute rests with the Attorney General, see Haw. Rev. Stat. . . 28-3 and 28-4 (1985 & Supp. 1989), we render no opinion on the legality of sections 2-121 through 2-126, Hawaii County Code, which limit access to voter registration computer tapes.

FACTS

On December 5, 1989, you requested access to a computer tape maintained by the Hawaii County Clerk, which contains data furnished in voter registration affidavits filed under section 11-15, Hawaii Revised Statutes. The Clerk refused to permit you access to this government record, relying upon the provisions of sections 2-121 through 2-126, Hawaii County Code. Article 20, Hawaii County Code, generally permits the Clerk to "rent" voter registration computer tapes only to "candidates, political parties, committee [sic], or service bureaus" and only for the purpose of "electioneering for public office purposes." Hawaii County Code . 2-122 (1985). Section 2-121, Hawaii County Code, defines "candidate" as an individual described by section 11-191(3), Hawaii Revised Statutes. Among other things, an individual is a "candidate" for purposes of the code by filing nomination papers for an office, or by receiving contributions exceeding \$100, or by incurring any expenses to bring about their nomination for election, or election, but in no event is a person deemed a "candidate" until January 1 of the year that person runs for office. Upon meeting these conditions, the individual "renting" the computer tape must also "agree[s] in writing that he will not use, sell or otherwise release the voter registration computer tapes or the duplicate for other than electioneering for public office purposes." Hawaii County Code . 2-124 (1985). Article 20, Hawaii County Code also restricts the information that the Clerk may release, to wit, "the name, residence address, mailing address and representative district and precinct of a voter." Hawaii County Code . 2-123 (1985). According to the Clerk, you could not qualify as a "candidate" until January 1, 1990, and therefore, your access to the computer tape was denied.

You request an advisory opinion regarding whether the UIPA requires that you be permitted to inspect and copy the voter

registration computer tape maintained by the Hawaii County Clerk's Office, when you are not a "candidate" as defined by section 2-121, Hawaii County Code.

DISCUSSION

The UIPA, the State's new public records law, is a comprehensive legislative framework which seeks to clarify the public's right to inspect government records, while protecting the individual's constitutional right to privacy. See Haw. Rev. Stat. . 92F-2 (Supp. 1989). While the UIPA is an expansive chapter concerning access to government records, in enacting the UIPA, the Legislature provided that its provisions must yield to statutes which address access to specific categories of government records. Thus, section 92F-12(b)(2), Hawaii Revised Statutes, generally provides that each agency "shall also disclose . . . [g]overnment records which, pursuant to . . . a statute of this State, are expressly authorized to be disclosed to the individual requesting access." Similarly, section 92F-13(4), Hawaii Revised Statutes, provides that the UIPA "shall not require disclosure of . . . [g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." With these general provisions in mind, we must examine various statutes which pertain to the public inspection of election records to resolve the issue presented.

A person who qualifies by law to register as a voter in any county must report to the county clerk¹ and complete a sworn affidavit setting forth their name, social security number, date of birth, place of residence (including mailing address), that such residence was acquired with the intent to make Hawaii their legal residence, and that they are a citizen of the United States. See Haw. Rev. Stat. . 11-15(a) (Supp. 1989). If the clerk is satisfied that the person registering is eligible to vote, the affidavit approved or accepted by the clerk is numbered and "filed by the clerk and kept in some convenient place so as to be open to public inspection and

¹ There are provisions to register those who are unable, for any cause, to report to the clerk's office. See Haw. Rev. Stat. . 11-16 (1985).

examination." Haw. Rev. Stat. . 11-15(d) (Supp. 1989) (emphasis added). Thus, the voter registration affidavits are, by statute, open to public examination. Further, pursuant to an Act approved June 8, 1977, ch. 189, 1977 Haw. Sess. Laws 403, section 11-14(b), Hawaii Revised Statutes, was created to provide that these affidavits "may be copied."²

Once having registered to vote, that voter's name and address must be entered into a general county register. See Haw. Rev. Stat. . 11-14(a) (1985). At the discretion of the clerk, the general county register may also contain additional information contained in each voter registration affidavit. Id. Section 11-14(a), Hawaii Revised Statutes, provides that "[t]he general county register shall at all times during business hours, be open to public inspection, and shall be a public record." (Emphasis added.) Similarly, section 11-97, Hawaii Revised Statutes, provides:

.11-97 Records open to inspection. The register of voters and all records appertaining to the registry of voters, or to any election, in the possession of the board of registration, the precinct officials, the chief election officer, or the clerk shall, at all reasonable times, be open to the inspection of any voter with the following exception: the voted ballots and other sealed election materials shall not be open to inspection of any voter until after the end of the contest period unless opened upon order of the court. [Emphases added.]

Unrestricted access to voter registration records or to records "appertaining to" the registry of voters and elections has been a cornerstone of Hawaii's election laws, dating from the Civil Laws of 1897:

² Before the enactment of section 11-14(b) Hawaii Revised Statutes, chapter 11, Hawaii Revised Statutes, only expressly required that the affidavits "be open to public inspection and examination." Haw. Rev. Stat. . 11-15(d) (Supp. 1989).

.53. The Register of Voters and all records appertaining to the registry of voters, or to any election, in the possession of the Board of Registration, the Inspectors of Election, the Marshal or any Sheriff, or the Minister, shall, except as provided in Section 114 hereof, at all reasonable times, be open to the inspection of any voter.

Civil Laws . 53 (App. 1897).

The advent of modern data processing systems has affected information storage and retrieval in both the public and private sectors. Documents which were available only in written forms now are contained in everything from cassette tapes to floppy disks. Thus, the UIPA provides that a government record includes "information maintained by an agency in . . . electronic, or other physical form." Haw. Rev. Stat. . 92F-3 (Supp. 1989). The Legislature also recognized the effect of the "information age" upon the conduct of elections as part of an Act approved June 8, 1977, ch. 189, 1977 Haw. Sess. Laws 403. The legislative history of Act 189 reflects the legislative purpose "to amend the election laws in order to achieve and maintain an efficient and effective election system" and "the implementation of methods and procedures which would result in an improved election administration." H.R. Conf. Comm. Rep. No. 37, 9th Leg., 1977 Reg. Sess., Haw. H.J. 1259 (1977). As amended by this Act, section 11-14(b), Hawaii Revised Statutes, was created to read:

The affidavits filed under section 11-15 and the general county register may be copied, and the clerk may release voter lists and tabulating cards or computer tapes containing data furnished in the affidavit, pursuant to ordinances promulgated by respective county councils. [Emphases added.]

In 1978, after the passage of Act 189, the County of Hawaii enacted sections 2-121 through 2-126, Hawaii County Code, which restrict the release of computer tapes containing voter registration data to only "candidates, political parties committee [sic] or service bureaus."³

³ The counties of Kauai and Maui have passed similar ordinances. See chapter 4, article 3, Kauai County Code; chapter 2.68, Maui County Code.

We must next examine whether the Legislature intended that section 11-14(b), Hawaii Revised Statutes, be used by the counties to pass ordinances which restrict access to the computer tapes to particular persons or organizations.

As a starting point, we believe the use of the word "may" in section 11-14(b), Hawaii Revised Statutes, is mandatory, rather than directory. While the use of the word "may" in a statute is usually presumed to be used in a directory sense, where the context indicates or where the object to be obtained compels a mandatory construction, the imperative shall be deemed the legislative intent. 2A Sands Sutherland Statutory Construction . 57.03 (4th ed. rev. 1984). Related statutes in pari materia, may be important aids in determining whether a statutory provision is mandatory or directory. "Thus, if the particular provision in question is part of a general legislative scheme, a consideration of the entire scheme together may make the particular provision clear." Id. at . 57.06. Additionally, "[w]here statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory." Id. at . 57.14. This rule has been enunciated by the United States Supreme Court as follows: "The conclusion to be deduced from the authorities is, that where power is given to public officers . . . --whenever the public interest or individuals rights call for its exercise--the language used, though permissive in form, is in fact peremptory." Board of Sup'rs, Rock Island v. United States 71 U.S. 435, 446, 18 L. Ed. 419 (1866). See also Kment v. City of Detroit, Police Dept., 311 N.W.2d 306, 312 (Mich. App. 1981) (statute mandatory when it authorizes a public officer to perform acts which concern the public interest or for the public's benefit).

These principles of statutory construction lead us to the conclusion that the use of the word "may" in section 11-14(b), Hawaii Revised Statutes, is mandatory rather than permissive. The general statutory scheme, of which section 11-14(b), Hawaii Revised Statutes, is a part, establishes that voter registration affidavits, the general county register, and records appertaining thereto, are "public" records. Additionally, chapter 11, Hawaii Revised Statutes, evidences a strong public interest in the disclosure of voter registration records, to act as a check against potential voter fraud. Under these circumstances, the public interest calls for the exercise of the

authority granted to the clerk in section 11-14(b), Hawaii Revised Statutes.

Section 11-14(b), Hawaii Revised Statutes, clearly permits the copying of voter affidavits and permits the clerk to "release" computer tapes containing data furnished in these affidavits. However, there is doubt or uncertainty concerning whether the Legislature intended to permit the counties to restrict access to computer tapes to certain persons pursuant to such ordinances. At a minimum, section 11-14(b), Hawaii Revised Statutes, is "imprecise" in this regard.

When the words of a statute are ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.

Haw. Rev. Stat. . 1-15 (1985).

Further, in construing an ambiguous statute, "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2A Sands Sutherland Statutory Construction . 46.05 (Sands 4th ed. rev. 1984). See also Pacific Ins. Co., Ltd. v. Oregon Automobile Ins. Co., 53 Haw. 208, 490 P.2d 899 (1971). As a corollary to this rule of statutory construction, statutes which relate to the same subject matter should be construed together, or in pari materia, so that effect is given to every provision in each statute. 2A Sands Sutherland Construction . 51.02 (Sands 4th ed. rev. 1984).

In applying these cardinal principles of statutory construction to section 11-14(b), Hawaii Revised Statutes, we arrive at the following conclusions. First, section 11-14(b), Hawaii Revised Statutes, provides that voter registration

affidavits "may be copied." We believe that this provision of section 11-14(b), Hawaii Revised Statutes, was enacted by the Legislature to clarify that not only are registration affidavits subject to "public inspection and examination," they are also subject to public duplication. Secondly, the ambiguous provisions of section 11-14(b), Hawaii Revised Statutes, appear in the context of subsection (a) which declares that "[t]he general county register shall, at all times during business hours, be open to public inspection, and shall be a public record." Haw. Rev. Stat. . 11-14(a) (Supp. 1989). Further, a related statutory provision requires that voter registration affidavits be "kept in some convenient place so as to be open to public inspection and examination." Haw. Rev. Stat. . 11-15(d) (Supp. 1989). These affidavits contain the information which, except for the voter's telephone number and social security number, is subsequently copied onto the computer tapes referred to in subsections 11-14(a) and (b), Hawaii Revised Statutes. Another related section, one a part of Hawaii election laws since 1897, provides that "[t]he register of voters and all records appertaining to the registry of voters, . . . in the possession of the . . . clerk shall . . . be open to public inspection." Haw. Rev. Stat. . 11-97 (1985). In our view, these provisions evidence a clear legislative intention to open voter registration records to the general public.

Turning to section 11-14(b), Hawaii Revised Statutes, we believe these provisions were intended to recognize the advent of modern data processing and storage techniques and to expressly enable the counties to permit release and copying of computer tapes, not restrict access to information compiled in more up-to-date formats. In short, we believe that this section was meant to facilitate the release, not the restriction, of public access to this information. A contrary construction of section 11-14(b), Hawaii Revised Statutes, would be absurd, as the computer tapes contain information which is unequivocally public under sections 11-14(c), 11-15(d) and 11-97, Hawaii Revised Statutes. This position is supported by the case of Ortiz v. Javamillo, 82 N.M. 445, 483 P.2d 500 (1971).

In Ortiz, the Supreme Court of New Mexico considered a decision of a trial court which denied access to government magnetic computer tapes containing data compiled from voter registration affidavits of the county, which as in the case

here, were indisputably "public" records. Among other things, the trial court concluded that release of the computer tapes would result in an invasion of privacy and that they were unique records which could not be distributed indiscriminately. In reversing the trial court, the New Mexico Supreme Court reasoned:

Respondent concedes the affidavits of registration which she keeps in her office . . . contain all the information found on the tape, and that petitioner, or anyone else . . . may inspect the affidavits of registration The right to inspect public records commonly carries with it the right to make copies thereof

We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety
. . . .

. . . .
We fail to understand how it can be said the inspection and copying of information contained in a written public record becomes confidential, or cloaked with a protection of privacy, upon being converted into a reproducible form on magnetic tape
. . . .

Ortiz 483 P.2d at 501 (emphasis added). Similarly, other courts have recognized that "the common law right to inspect and copy public records originally permitted copying of the content of written documents. With the advent of modern means of document reproduction . . . the right was applied to copying the physical embodiment of the document." Application of National Broadcasting Co., Inc. 635 F.2d 945, 950 (2d Cir. 1980).

Lastly, the legislative history and committee reports to section 11-14(b), Hawaii Revised Statutes, upon examination, provide no support for a construction of this statute that would restrict access to the computer tapes to specific persons or

those with a particular status.⁴ Like the court in Ortiz recognized, however, we believe that by virtue of section 11-14(b), Hawaii Revised Statutes, the counties may enact ordinances providing reasonable procedures concerning when, where, and how the computer tapes may be inspected and copied, or otherwise protecting the pertinent computer tapes from damage, loss, or destruction.

Based upon the foregoing construction of section 11-14(b), Hawaii Revised Statutes, we conclude that the Legislature did not intend that it result in the passage of ordinances which reserve to only particular persons or organizations the right to receive a copy of voter registration computer tapes. In our opinion, section 11-14(b), Hawaii Revised Statutes, permits any person to obtain a copy of voter registration computer tapes, subject to reasonable procedures adopted by the counties concerning when, where, and how they may be copied. However, we observe that the authority to render legal advice concerning whether a municipal ordinance conflicts with its enabling state statute rests with the Attorney General, not the Office of Information Practices. See Haw. Rev. Stat. .. 28-3 and 28-4 (1985 & Supp. 1989).

CONCLUSION

The UIPA provides that each agency "shall disclose . . . [g]overnment records which pursuant to . . . a statute of this State, are expressly authorized to be disclosed." Haw. Rev. Stat. . 92F-12(b)(2) (Supp. 1989). Chapter 11, Hawaii Revised

⁴ In fact, the legislative history to section 11-14(b), Hawaii Revised Statutes, states that "[s]ection 11-14 is amended to provide that copies of voter lists and tabulating cards or computer tapes may be released pursuant to county ordinance, and to provide correlation of registration information from all counties to prevent duplicate registration and [to] compile election reports." H.R. Conf. Comm. Rep. No. 37, 9th Leg., 1977 Reg. Sess., Haw. H.J. 1259 (1977); H.R. Stand. Comm. Rep. No. 546, 1977 Reg. Sess., Haw. H.J. 1542 (1977); S. Stand. Comm. Rep. No. 768, 1977 Reg. Sess., Haw. S.J. 1177 (1977); S. Conf. Comm. Rep. No. 35, 1977 Reg. Sess., Haw. S.J. 867 (1977).

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Statutes, unequivocally requires that voter registration affidavits and records "appertaining to" the registry of voters or to elections be available for public inspection and copying.

Because sections 11-15(d) and 11-14(b), Hawaii Revised Statutes, permit the inspection and duplication of voter registration affidavits, we do not believe the Legislature intended section 11-14(b), Hawaii Revised Statutes, be used to restrict access to computer tapes containing similar data to particular persons or organizations. However, the authority to render legal advice concerning whether a municipal ordinance conflicts with its enabling state statute rests with the Attorney General, not the Office of Information Practices. See Haw. Rev. Stat. .. 28-3 and 28-4 (1985 & Supp. 1989).

Very truly yours,

Hugh R. Jones
Staff Attorney

HRJ:sc

cc: The Honorable Benjamin J. Cayetano
Lieutenant Governor of Hawaii

The Honorable John A. Wagner
Hawaii County Clerk

APPROVED:

Kathleen A. Callaghan
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